FILED
AUG 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * * *

No. 77-1164

* * * *

DR. N. JAY ROGERS, et. al.,
Appellants

v.

DR. E. RICHARD FRIEDMAN, et. al.,
Appellees

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

* * * *

BRIEF FOR THE APPELLEES IN NO. 77-1164

* * * *

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* * * *

STATEMENT OF THE CASE

The procedural background and history of this case have been previously set out in the Brief for the Appellants filed in *Friedman v. Rogers*, No. 77-1163. Appellees herein rely on the Statement of the Case contained in that brief as correctly stating the facts pertinent to the questions before the Court, in addition to the following Statement.

Appellants contend that the evidence produced at trial refutes all of the proferred rational bases for section 2.02 of the Texas Optometry Act. The lower court, however, in noting that the burden is on the one

attacking the legislative arrangement to negate every conceivable basis which might support it, found that Appellants had not carried the heavy burden required of them to prevail on equal protection grounds in the face of Appellees asserted rational bases. The court also held that Appellants substantive and procedural due process arguments were without merit.

The State went beyond what is required of it and presented evidence to support its alleged rational bases for section 2.02. For example, Appellees presented a variety of evidence in support of their contention that Texas Optometric Association (TOA) members are more likely to be economically independent that non-TOA members and thus less likely to be affected by any conflict of interest. Contractual agreements for partnerships and for the purchase of Texas State Optical (TSO) offices entered into between Appellant Board member and other optometrists were admitted at trial and establish a close connection between the buyer and the seller as well as the seller's optical supply company. The State could rationally expect that such contractual arrangements, with the resultant dependence of the buyer optometrist upon the seller optical company, could affect the impartiality of such a buyer as a potential Board member (App. Vol. I, 71-98).

Appellees further introduced contracts between optical companies and practicing optometrists which guaranteed the optometrist a salary but gave both parties the power to terminate with only ten days notice. An optometrist, who was at one time a part owner in a large optical company, testified that if an optometrist employed by him when he was part owner of Lee Optical were a member of the Board and voted against the best interests of Lee Optical, that optometrist would either have been fired or forced to terminate because of unpleasant conditions (App. Vol. II, 159).

While Appellees submit that the State, without more, could rationally require a TOA majority due to TOA members' economic independence and lack of direct economic interest in the operation of the statutory provisions, the present composition is also a result of incidents taking place shortly before the adoption of the Act which might indicate to the Legislature that TOA members are more prone to enforce the Optometry Act than non-TOA members. These incidents are discussed in detail in the Argument and Authorities.

There are several issues raised by Appellants in their brief on the merits that were not raised in the court below and should not be considered by this Court. Appellants have raised the issue that Dr. Rogers's "First Amendment rights to shape his associations free of government repressions" have been infringed. This issue was not tried in the court below nor was there any evidence adduced to support this contention. Appellants have even raised, in their brief on the merits, an issue that was not raised in their Jurisdictional Statement filed with this Court. Appellants claim for the first time that section 2.02 of the Texas Optometry Act conflicts with section 1 of the Sherman Antitrust Act and thereby violates the Supremacy Clause. Neither of these two contentions are properly before this Court.

SUMMARY OF ARGUMENT

The lower court correctly held that section 2.02 of the Texas Optometry Act constitutes a valid exercise of the State's authority to regulate economic matters and the provision of health care within its jurisdiction. There is no argument between the parties concerning the existence of two distinct factions of optometrists in Texas. The dispute centers around the characteristics of the two factions and whether the State may choose to entrust the enforcement of its laws to members of one faction. The record in this case, particularly the documented facts rather than the self-serving opinions,

clearly illustrates the wisdom of the legislative choice at issue, even though the wisdom of the choice is not a proper judicial inquiry. *North Dakota State Board of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156 (1973). It is sufficient that the Legislature could have reasonably believed that section 2.02 would tend to insure the enforcement of the State's visual health legislation.

The enactment of section 2.02 reflects the concern of the Legislature that the commercialists would put their own economic welfare ahead of the statutory goal of adequate eye care for the public. Perhaps the best illustration of the problem which necessitated the enactment of section 2.02 is Appellants' erroneous view of the purpose of membership on the Optometry Board. Members of the Board are selected to represent primarily the Legislature and the public interest, not "the interests of . . . licensed optometrists" as claimed by Appellants. Brief for Appellants at 10. This basic misconception, which permeates the brief filed on behalf of Dr. Rogers, provides an illustration of his point of view and the rationale underlying the State's decision to prevent commercialists from controlling the Board.

The evidence shows that the differences between the two factions in optometry are not limited to their views regarding the propriety of advertising of professional services. The economic independence of TOA members and their lack of any direct pecuniary interest in not enforcing the statute provide ample rationale for the conclusion that TOA members are more likely to enforce the law than non-members. Certainly the equation is not exact, but most non-TOA members are "commercialists" who would directly benefit from the failure of the Optometry Board to enforce many provisions of the law.

Appellants place great weight on the testimony of Board member Dr. Hugh Sticksel, Jr., and his inability

to distinguish between control over a Board member employed by a TOA member and one employed by Texas State Optical. The distinction lies in the interest of those who could exert such control over a Board member. It is clear that the chain optical companies would have much to gain from any influence upon a Board member. Clearly, the less vigorous the enforcement of commercial restrictions, the less economic loss the chain optical companies suffer. Dr. Rogers based this lawsuit on the premise that he would secure more business for TSO if commercial restrictions were removed from the practice of optometry in Texas. A TOA member simply does not have such a inevitable, direct economic interest in these matters. The State has created a Board which will not be controlled by those with such conflicts of interest, but has not precluded their representation on the Board.

Appellants assert that since all optometrists agree on the proper examination of patients, the assertion that TOA members are more likely to emphasize the highest quality of eye care is without basis. What Appellants ignore is the impact of commercial methods upon the likelihood that a patient will receive the care that all acknowledge he should. The Legislature has decided that certain conduct leading to a high volume optometric practice would tend to result in poor quality eyecare. The fact that Dr. Friedman would expect and hope that the same patient care would be given by a TOA member and a commercialist does not indicate that the same would hold true in the absence of vigorously enforced commercial restrictions. Appellants have failed in their burden to show the lack of this rational basis.

Section 2.02 does not create a suspect classification and does not affect the exercise of any fundamental right; thus it is valid if supported by a rational basis. However, the State has surpassed that requirement and

shown that the statutory composition of the Board satisfies a compelling interest. In order to assure the proper enforcement of the law, the Legislature required that a majority of the Board members be "professional" optometrists whose economic independence and lack of any direct pecuniary interest in matters before the Board would render them less likely to be affected by any conflict of interest.

The statute does not affect or penalize the exercise of any person's rights of association. Nor does it create an unconstitutional irrebuttable presumption, violate any due process rights, or deny any person the right to receive commercial information.

ARGUMENT AND AUTHORITIES

I.

INTEREST SUPPORTING SECTION 2.02

The record in this cause clearly illustrates the rationale of the Legislature in providing for a TOA majority on the Board. The economic dependence of commercial optometrists may be discerned from the McGuire and Moore contracts for partnerships and for the purchase of TSO offices (App. Vol. I, 71-98). These instruments establish a close connection between the buyer (the optometrist) and the seller (Rogers Bros.) as well as the seller's optical supply company. The buyer is required to follow seller's rules, regulations and policies for office management. He is required to participate in seller's advertising and to use seller's accounting service. He is required to purchase all optical supplies from seller and is bound to seller's pricing of services and products. The State can rationally expect that such contractual arrangements with the resultant dependence upon the seller could affect the impartiality of such a buyer as a Board member. But the contracts go even further; Rogers Bros. has the right to accelerate

the sale of the office, thereby depriving the buyer of his contractual protection against partnership losses and of his guaranteed salary. It can hardly be contended that such a contractual right could not be explicitly or implicity utilized to bring pressure on a Dr. McGuire or Dr. Moore were they Board members.

Such contracts are not unique among commercial optometrists. Dr. Mora was a party to a contract with Lee Optical which guaranteed him a salary but gave both parties the power to terminate with ten days notice (Deposition of Dr. Mora, taken April 27, 1976 at 8, l. 1-10, 19-21). The possibility of pressure from a seller optical company is clear, and has been recognized by another member of the Board (App. Vol. III, 266).

This type of danger is further documented in Dr. Shannon's deposition. Dr. Shannon was a part owner in Lee Optical at one time, but has since retired "for all practical purposes." Thus, unlike Dr. Rogers, he had no pecuniary interest in the outcome of this lawsuit. Dr. Shannon explained at App. Vol. II, 158-59.

> I would be a far better State Board member today than what I would have been twenty years or more ago because now the interest that I have would be strictly for optometry and for the public, where twenty years ago I would have been interested in trying to get men through the State Board, possibly become employees of mine, and I would have had my business interest probably foremost.

Dr. Shannon's testimony merely confirms what common sense leads one to believe: the chain optical companies have much to gain from any influence upon a Board member. Dr. Rogers acknowledges that many provisions of the Texas Optometry Act are to his economic detriment. (Deposition of Dr. Rogers taken April 6, 1976, at 58, l. 19-24; 59, l. 1-7, 16-18; 63, l. 16;

65, 1. 19; Deposition of Dr. Rogers taken January 13, 1976, at 49-50; 55, 1. 15-19).[1] Some of these provisions, such as those requiring the physical separation of optometrists' offices from opticians' offices, are not under attack in this case. The Legislature was so concerned that this section might not be enforced that they clearly stated their intent in the text of the statute.

> The purpose of this section is to insure that the practice of optometry shall be carried out in such a manner that it is completely and totally separated from the business of any dispensing optician, with no control of one by the other and no solicitation for one by the other, except as hereinafter set forth.

Section 5.15(a), Texas Optometry Act. Clearly the less vigorous the enforcement of this provision, the more money the chain optical companies make, since they would get all of an employed optometrist's business. Similarly, since these statutes constitute restrictions on commercialism with an attendant reduction of optometric patients who would be secured by such commercial means (Rogers Dep. II at 63, 1. 4-5), an individual commercial optometrist would also suffer economic loss from the operation of the statutes. Accordingly, the State has created a Board which will not be controlled by those with such conflicts of interest, but has not precluded such persons from serving on the Board.

Dr. Chester Pheiffer, who has been Dean of the College of Optometry at the University of Houston since 1952, and who has no personal economic interests at stake, recognized the legitimate interests that are served by the composition of the Board. (Deposition of

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[1]Hereinafter, Dr. Rogers's January 13, 1976 deposition will be referred to as "Rogers Dep. I", his April 6, 1976 deposition as "Rogers Dep. II."

Dr. Phieffer at 74-76). TOA members have historically practiced in a different manner from commercialists, (Rogers Dep. II at 71, 1. 2-4, 10-22; 72, 1. 1-11; Rogers Dep. I at 40-41); that is, they have practiced in a manner now required by statute. As Board members they would therefore have little economic interest in avoiding the enforcement of statutory restrictions upon commercial practices which they do not and have not utilized. (Deposition of Dr. Waldman at 40, 1, 24- p. 41, 1. 8).

Appellants assert that since all optometrists agree on the proper examination of patients, the assertion that TOA members are more likely to emphasize the highest quality of eye care is without basis. What Appellants ignore is the impact of commercial methods upon the likelihood that a patient will receive the care that all acknowledge he should. The Legislature has decided that practices leading to a high volume optometric practice would tend to result in poor quality eyecare. The fact that Dr. Friedman would expect and hope that the same patient care would be given by a TOA member and a "commercialist" does not indicate that the same would hold true in the absence of vigorously enforced commercial restrictions. The Legislature concluded that TOA members would be more likely to enforce commercial restrictions, which would ultimately result in better eyecare for the public. Appellants have failed in their burden to show the lack of this rational basis.

While Appellees submit that the State, without more, could legitimately require a TOA majority due to TOA members' economic independence and lack of direct economic interest in the operation of the statutory provisions, the present composition is also a result of the Legislature's knowledge of incidents taking place shortly before the adoption of the Act.

In 1967, Dr. Geller and Dr. Shropshire were nominated to the Optometry Board. Both men worked

for Lee Optical at the time (App. Vol. III, 212). Since there were only five members of the Board, one of whom was Dr. Rogers, these nominations gave the commercialists control of the Board. At a meeting held without a quorum (App. Vol IV, 397), Dr. Rogers was elected president of the Board. (Rogers Dep. II at Exhibit 2). Within months Dr. Rogers had initiated a mail ballot which contained a vote concerning the repeal of the Professional Responsibility Rule. (Rogers Dep. II at Exhibit 3). This Rule had been adopted in 1959 pursuant to an Attorney General's Opinion and a 542 to 31 vote in its favor in a poll of all Texas optometrists. (Rogers Dep. II at exhibit 9). Nevertheless, Drs. Rogers, Geller, and Shropshire voted to repeal the Rule. (Rogers Dep. II at Exhibit 3). There arose a dispute as to whether the Rule had or had not been legally repealed, with the Board's attorneys, such as Mr. Tom Gee, being of the opinion that it had not. (Rogers Dep. II at Exhibits 4, 5, 6, 8). Apparently the dispute was never settled.

In 1969, however, the Legislature codified the Rule. *Compare* Rogers Dep. II, Exhibit 9 *with* Tex. Rev. Civ. Stat. Ann., art. 4552-5.13. The Legislature was aware of the incidents concerning the attempted repeal of the Rule (Rogers Dep. II at 74, l. 11-21; App. Vol. III, 210-13, 237). As counsel for Dr. Rogers noted, the best evidence of the effect of such information on the Legislature is found in its actions (Rogers Dep. II at 94, l. 4). The Legislature rejected the nominations of Drs. Geller and Shropshire (Rogers Dep. II at Exhibits 10, 11), codified the Rule, and in apparent agreement with Dr. Riley that commercial control meant no law enforcement (App. Vol. III, 214), required that a majority of the Board be members of TOA. The State views the actions taken by Drs. Rogers, Shropshire, and Geller as providing an admittedly simple, but nevertheless valid, rationale for a TOA majority. Where regulations operate to the detriment of, and are opposed

by, a group of persons, the State must be allowed to prevent those persons from controlling their enforcement.

II.

EQUAL PROTECTION

Section 2.02 does not violate any person's equal protection rights; it has no demonstrable impact upon rights of association. Dr. Rogers asserts that a non-TOA member "is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority." Brief for Appellants at 14. This statement is patently false since Dr. Rogers has been a member of the majority many times. Any optometrist in Texas may be appointed to the Board and may be a member of a majority whenever he chooses to vote with the majority. Dr. Rogers's assertion that he cannot ever be a member of the Board majority assumes that he and TOA members have diametrically opposite views on every matter coming before the Board. The only Board members who are not able to be members of the majority are those who cannot, for whatever reason, join in the enforcement of the statute.

Dr. Rogers can claim no support from cases such as *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), *Turner v. Fouche*, 396 U.S. 346 (1970), *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Elrod v. Burns*, 427 U.S. 347 (1976). These cases involved restrictions on access to the ballot and absolute prohibitions of employment. As noted by the lower court, the requirement at issue does not deny any person the opportunity to serve on the Board. *Keyishian* and *Elrod* dealt with public employment rather than membership on the governing board of a state agency. The impairment of first amendment rights was "significant;" the exercise

there of was the basis for a denial of employment with the resultant loss of livelihood. *Elrod, supra* at 362. In the *Elrod* case, the purpose of the governmental action was to create an incentive for the sacrifice of first amendment rights. Furthermore, neither *Elrod* nor *Keyishian* relates to the issue herein for they did not concern policy making positions. The "nature of the responsibilities is critical." *Elrod, supra* at 367. In *Williams v. Rhodes, supra*, the governmental action totally frustrated the right to form a political party. And in *Turner v. Fouche, supra*, the Court avoided the question of standard of review by finding that no rational basis supported the qualification for office.

In contrast, the requirement of section 2.02 is based upon the fundamental governmental interest of insuring that administrative agencies administer the law in accordance with the will of the Legislature, rather than in accordance with their own. The major thesis of section 2.02 is "to serve this great end of Government - the impartial execution of the laws . . .." *C.S.C. v. Letter Carriers*, 413 U.S. 548, 564-65 (1973). This interest is particularly strong in this case in light of the State's "special responsibility for maintaining standards among members of the licensed professions." *Ohralik v. Ohio State Bar Association*, 46 U.S.L.W. 4511, 4514-15 (1978).

In its endeavor to insure the enforcement of the law, the Legislature has wrought no significant intrusion upon first amendment rights. Using Appellant's figures, a TOA member has approximately a 1% chance of becoming a Board member as opposed to a non-member's 1/2% chance. It would be irrational to assume, and the evidence herein has not shown, that this provides *any* incentive for the sacrifice of first amendment rights. Certainly that is not the purpose of section 2.02. *See Elrod v. Burns*, 427 U.S. at 361. While

the Optometry Board has no substantive rule making authority and thus its members may not hold what is classicly thought of as policy making positions, the State has no less an interest in the selection of those to whom it entrusts the enforcement of its laws. C.f.*Foley v. Connelie*, 46 U.S.L.W. 4237 (1978).

This case is controlled by *C.S.C. v. Letter Carriers*, 413 U.S. 548 (1973) and *American Communications Association v. Douds*, 339 U.S. 382 (1950). There is perhaps no more compelling governmental interest than the proper enforcement of its laws. *C.S.C. v. Letter Carriers, supra.* In *Douds*, the Court sustained a statute which discriminated against labor unions whose officers had not filed a "non-communist" affidavit. The Court relied upon *Board of Governors v. Agnew*, 329 U.S. 441 (1947) and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and, in discussing *Agnew*, the Court stated:

> [I]t can hardly be doubted that voluntary affiliations and beliefs justify a[n]... inference [concerning future conduct] when drawn by the legislature on the basis of its investigation.
>
> This principle may be illustrated by reference to statutes denying positions of public importance to groups of persons identified by their business affiliations. One federal statute, for example, provides that no partner or employee of a firm primarily engaged in underwriting securities may be a director of a national bank. There was no showing, nor was one required, that all employees of underwriting firms would engage in [improper] conduct. Because of their business connections, carrying as they do certain loyalties, interests and disciplines, those persons were thought to pose a continuing

> threat of participation in the harmful activities described above. Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by §9(h) would be subject to "tempting opportunities" to commit acts deemed harmful to the national economy. In this respect, §9(h) is not unlike a host of other statutes which prohibit specified groups of persons from holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.

339 U.S. at 391-92.

Thus, regardless what standard of review is applied, the Legislature could act to avoid the evils which it had witnessed and which were likely to continue, and could constitutionally require a majority of the Board to be members of an organization which had illustrated its willingness to observe and enforce state law.

Fifteen states either require Board members to be members of state optometric associations which are affiliated with the American Optometric Association or require the governor to select Board members from a list of nominees prepared by such associations. Such statutes have been upheld when challenged, since "the question of public policy involved in the composition of administrative agencies is for the legislature to debate and decide . . .." *Kachian v. Optometrists Examiners Board*, 170 N.W. 2d 743, 748 (Wis. 1969). *See, McCrory v. Wood*, 171 S.2d 241 (Ala. 1965); *Marks v. Frantz*, 298 P.2d 316 (Kan. 1956). *See also, Seidenberg v. New Mexico Board of Medical Examiners*, 452 P.2d 469 (N.M. 1969); *Lanza v. Wagner*, 183 N.E. 2d 670 (N.Y. 1962), *cert.*

denied, 371 U.S. 901; *Ashmore v. Greater Greenville Sewer District*, 44 S.E. 2d 88 (S.C. 1947); *In re Opinion of the Justices*, 42 S.2d 56 (Ala. 1949); *Bradley v. Board of Zoning Adjustment of City of Boston*, 150 N.E. 892 (Mass. 1926); *In re Campbell*, 47 A. 860 (Pa. 1901); *Cohen v. State*, 275 N.Y.S. 2d 719 (N.Y. Sup. 1966); 63 Am. Jur. 2d *Public Officers and Employees* §94 (1972); 16A C.J.S. Constitutional Law §460 (1956).

Furthermore, as recognized by the lower court, section 2.02 constitutes an exercise of the State's power in the area of economic regulation. Consequently, "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Contrary to the assertion of Dr. Rogers, the Optometry Board has not exercised any substantive rule-making authority. Its interpretations are merely attempts to apply the language of the statute to specific factual situations and thus advise optometrists of what action the Board considers to be a violation of the statute. (Rogers Dep. I at 143, l. 8-16; 164-65; Rogers Dep. II at 133, l. 20-24).

If the Court sees the Interpretation as relevant, they should be examined individually, for the State believes that each Interpretation passed over Dr. Rogers's objection constitutes the proper construction of the statutes in question. These would be numbers 6, 7, 9, 10, 11. (Rogers Dep. I at Exhibits 12-22).

Board Interpretation Number 6 has been upheld as

the correct construction of the law by the Attorney General and the courts of this State. Attorney General Opinion M-1029 (1971); *Texas State Board of Optometry v. Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex. Civ. App.-Eastland 1974, writ ref'd n.r.e.).

The first portion of Number 7 was upheld in *Texas State Board of Optometry v. Lee Vision Center, supra*, as the correct construction of the law. The court noted that an opticianry could advertise prices only upon receipt of a permit. Article 4552-5.10(b) of the Texas Optometry Act prohibits the advertising of price or reference to price without a permit. Section 5.10(f) provides that advertising pursuant to such a permit shall not "contain any language which directly or indirectly compares the prices." Thus number 7 stands on solid footing as a simple explanation of the statute.

Interpretation number 9 merely paraphrases the prohibition of practice under an assumed name contained in Article 4552-5.13(d). The Interpretation operates on all optometrists alike; in fact it was enforced against a TOA member using the TOA emblem (Rogers Dep. II at Exhibit 1, vote of October 23, 1974). Certainly no "professional" bias is evident here.

Interpretations 10 and 11 require solid opaque partitions between an optometrist and optician and prohibit the use of a common reception or foyer. The reason for these is given in number 10. The Act provides that the practice of optometry "shall be . . . completely and totally separated from . . . any dispensing optician." Art. 4552-5.15(a). Section 5.15(b) requires separation by a solid partition or wall from floor to ceiling and requires optometrists to have a patients' entrance from a public thoroughfare. Certainly the combination of the intent expressed in section 5.15(a) and the specific prohibitions of 5.15(b) provides a sound statutory basis for Interpretation Numbers 10 and 11.

Although Appellees do not see the relevancy of the Board Interpretations to this lawsuit, the Interpretations appear to be correct constructions of the Act and therefore do not even purport to alter the statutory restrictions. Thus, the Interpretations do not result from any supposed bias on the part of the TOA members, nor do they constitute substantive rule-making. In fact, the negative votes of Dr. Rogers and his fellow non-TOA member indicate that the Legislature was wise in providing for the TOA majority.

Of some peripheral interest in this matter are the FTC regulations promulgated May 24, 1978. 43 Fed. Reg., 23992 (June 2, 1978). Section 456.6(c) expressly prohibits the conditioning of membership in organizations such as TOA upon a requirement to refrain from the dissemination of information. Although Appellees contend that they have proven the legitimacy of Section 2.02 despite all of Appellants assertions, the FTC regulations, if upheld by the courts, totally moot Dr. Roger's arguments that "an optometrist who claims his right of commercial free speech or who simply does not desire to abdicate that right by submitting himself to the restrictions of the AOA-TOA Code of Ethics and Rules of Practice is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority." Brief for Appellants at 14. Although the FTC regulations have been challenged in court, as of the time this brief was printed, the regulations were in effect.

III.

DUE PROCESS

A. Substantive Due Process

The lower court dealt with Appellants' irrebuttable presumption argument as follows:

> Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441 (1973); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state regulation of economic matters. See, *e.g. New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra.* A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

Rogers v. Friedman, 438 F.Supp. 428, 433 (E.D.Tex. 1977). The lower court was clearly correct; Appellants' view amounts to a restructuring of the equal protection standards which have long been observed by this Court, since any classification creates the type of presumption challenged here. *See Board of Governors v. Agnew*, 329 U.S. 441 (1947); *Rubins v. Ghezzi*, 512 F.2d 431 (2nd Cir. 1975). Similarly, the standard of review is not heightened by the bare allegation of infringement upon rights of association. As discussed above, there is no evidence in support of this claim and the statute does not infringe in any manner upon the freedom of an optometrist to belong to any association.

B. Procedural Due Process

Appellants' procedural due process claim is also with merit. As stated by the lower court in discussing the

applicability of *Gibson v. Berryhill*, 411 U.S. 564 (1973) and *Wall v. American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D.Ga. 1974), aff'd, 419 U.S. 888 (1974):

> *Wall* and *Gibson*. . . . are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which surround disciplinary adjudications; (2) in those cases the board had rule-making power, which they had exercised, while in the instant case the Texas Board has no rule-making power, but only power to enforce what the legislature has mandated; and (3) all members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

Rogers v. Friedman, 438 F. Supp. at 433. Furthermore, in *Gibson* and *Wall* the Court was concerned with an effort "to revoke the licenses of all optometrists . . . employed by business corporations such as Lee Optical . . .."*Gibson v. Berryhill*, *supra* at 578; *Wall v. American Optometric Association, Inc.*, *supra* at 188-89. From the enactment of section 2.02 in 1969 to the present, the Texas Optometry Board has revoked only one license, and there was no appeal taken by the optometrist involved. Unlike the fact situation in *Gibson*, there is no wholesale discrimination and no direct pecuniary benefit to be gained by any TOA Board Member from any official action (Deposition of Dr. Mora taken April 27, 1976 at 13, 1. 1-5). *See Texas State Board of Optometry v. Lee Vision Center, Inc.*, 515 S.W. 2d 380 (Tex. Civ. App.-Eastland, 1974, writ ref'd n.r.e.). By comparison, commercial optometrists are in a position to benefit from the failure to enforce statutory

provisions which restrict commercial practices. Furthermore, even Dr. Rogers and Dr. Mora, the other non-TOA Board member, agree that the Board's enforcement procedure is fair (Rogers Dep. II at 8, l. 21-22; Deposition of Dr. Mora # II at 31, l.4). In many instances, the two non-TOA members of the Board comprise one half of the four Board members who hear the testimony and vote on the action to be taken against an optometrist who has been brought before the Board for a disciplinary proceeding since the two members of the Board who were responsible for investigating do not vote or participate in the proceeding. Often, those two investigating Board members are two of the four TOA Board members. Since it takes a majority of all voting members to discipline an optometrist, the votes of the two non-TOA members would certainly be controlling. Even in situations where three of the four voting members are TOA members, the record demonstrates that the Board has required only that optometrists practice in accordance with the provisions of Texas law. (Deposition of Dr. Burton at 36, l. 1-2; Deposition of Dr. Friedman at 14, l. 21-22; 23, l. 9-11).

Appellants recite a list of actions taken by the Board that Dr. Rogers alleges adversely affect him. Brief for Appellants at 30-32. Although Appellees disagree with the facts as stated in Appellant's brief, the merits of these claims are not before this Court and do not carry constitutional implications. Furthermore, Dr. Rogers's assertion that the Board's composition affects "everything it does" contradicts his own testimony. Brief for Appellant at 30. Dr. Rogers could not explain how the Board's composition affected the examination and licensing of optometric candidates (Rogers Dep. II at 166-67).

Dr. Rogers has attempted to twist a recent action of the Board in order to bolster his procedural due process arguments. Dr. Rogers claims that "[e]ven at present

the TOA supermajority has caused a pending threat of legal action to be lodged against [him]." Brief for Appellants at 37; *See also* Brief for Appellants at 31-32. The merits and the details of the action taken by the Board was discussed in the Brief for Appellants filed in 77-1163 at 9-10,[2] and it is clear that the Board was merely carrying out its statutory duties in asking the Attorney General to enforce section 5.11 of the Act. The provision in question, which prohibits certain types of window displays, has not been declared invalid by any court. At any rate, the issue has been mooted by the fact that the Board, in its desire to observe the law, has withdrawn the request made to the Attorney General on the basis that the new FTC regulations might bar the enforcement of section 5.11. A copy of that letter is reproduced in Appendix "A."

It is typical of Dr. Rogers's position herein that he would claim a procedural due process violation in a request to the State's legal counsel merely to enforce the law. Dr. Rogers's claim that the "currently-pending threat of legal action . . . makes §2.02 of the Act ripe for review of Dr. Rogers' claim at this time," is also without merit since no suit has even been filed and Dr. Rogers has obviously not exhausted his administrative remedies. Furthermore, these contentions emphasize that the State has a compelling interest in preventing commercialists from controlling the Board; they simply would not fulfill the Board's duty to enforce the law.

Dr. Rogers's allegation of pecuniary interest on the part of the Board members arising from the placing in jeopardy of "his license or his good name and reputation" is without support in the record. The Board members have established practices and are able to

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[2]*See also* the Application for Stay and related exhibits filed in this Court in 77-1163, on May 30, 1978.

secure higher fees, presumably because of their reputations. With about one thousand optometrists in Texas, the possibility that these elite few will gain or lose patients due to any restriction on commercial methods or due to the outcome of this lawsuit is remote and speculative. Dr. Benham, a witness for Dr. Rogers, agreed (Benham, Direct Interrogatories No. 20, 23, App. Vol. IV, 338-39.) Similarly, it is unlikely that they would gain patients by virtue of the loss of Appellant's "good name and reputation." In any event, Dr. Rogers will sustain no such loss if he would merely observe the laws of the State.

Appellants have taken notice that the decision in *Wall v. American Optometric Association, Inc., supra,* is contrary to their position herein. Brief for Appellants at 44. Furthermore, the procedural due process questions in *Wall* are not present in the instant case since there is no disciplinary proceeding threatened or underway. Even were such a proceeding in progress, there would be no due process violation. The record of the Board shows the absence of any large scale action against commercial optometrists which would give rise to any pecuniary interest on the part of TOA Board members. Since the Board has restricted itself to its proper function as a policing agency and has not acted outside the scope of its statutory authority, nine years of history conclusively illustrate the absence of the problems present in *Gibson v. Berryhill, supra.*

IV.

RIGHT TO RECEIVE COMMERCIAL INFORMATION

There is no evidence in the record which supports the far-fetched claim that section 2.02 operates to deny

consumers the right receive commercial information.[3] The State has neither encouraged nor discouraged optometrists from joining any association. Certainly the very minimally greater chance of becoming a Board member if an optometrist joins the TOA will not cause a person to refrain from advertising if he desires, and there is no evidence which illustrates that any person has been so deterred. The Board has never acted against an optometrist for lawful advertising; thus there is no "pressure . . . to conform . . . to the mode of practice for which TOA stands." Furthermore, the new FTC regulations, if upheld, would totally moot this argument by outlawing the requirement for TOA membership about which Appellants complain.

V.

ANTITRUST

For the first time since this lawsuit was filed in August, 1975, Appellants claim that section 2.02 conflicts with section one of the Sherman Antitrust Act and therefore violates the supremacy clause of the United States Constitution. This issue has never been a part of this lawsuit, and this Court should not remand this case to the trial court for further proceedings in this regard. If Appellants wish to raise this issue, they can certainly attempt to do so in a separate lawsuit. Furthermore, pursuant to Rule 40 (1)(d) of the Supreme Court Rules, the brief on the merits may not raise additional questions or change the substance of the questions presented in the jurisdictional statement; even Appellants admit that this question has not been raised previously in this suit. Brief for Appellants at 56.

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[3]In fact there was never any admissable evidence produced showing that the Senior Citizens Organization even existed, much less their interest in the suit or how section 2.02 affected them.

Appellants reliance on *National Society of Professional Engineers v. United States*, ___ U.S. ___, 98 S.Ct. 1355 (1978) is misplaced. That case did not involve a state statute, but instead involved an anti-competitive bidding rule of a private organization. Appellants' objections are with the Code of Ethics and Rules of Practice of the TOA, not with the State. Appellants have not even suggested how section 2.02 affects the operation of the Sherman Act, and certainly it does not.[4] In this context, Appellees would reiterate that there is no evidence in this voluminous record to indicate that section 2.02 has deterred any optometrist from engaging in commercial speech.

CONCLUSION

For the reasons stated Appellees respectfully pray that the judgment of the three-judge court upholding section 2.02 of the Texas Optometry Act be in all respects affirmed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

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[4]Although Intervenors-Appellants Senior Citizens Association claim the requisite standing to press a supremacy clause challenge to section 2.02 as representative members of the prescription eyewear-consuming public in Texas, there is no evidence in the record to support *any* factual findings regarding the status of the Senior Citizens Group. Appellants presented no evidence to show how the Senior Citizens Group is affected by section 2.02.

DOROTHY PRENGLER
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

CERTIFICATE OF SERVICE

I, Dorothy Prengler, a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing Brief for the Appellees has been served on all parties required to be served by placing same in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to all counsel of record: Mr. Larry Niemann, 1210 American Bank Tower, Austin, Texas 78701, Mr. Robert Q. Keith, 1400 San Jacinto Bldg., Beaumont, Texas 77701 and Mr. John Tucker, P. O. Box 1751, Beaumont, Texas 77704 on this the ___ day of August, 1978.

DOROTHY PRENGLER

APPENDIX

A P P E N D I X "A"

TEXAS OPTOMETRY BOARD

COMMERCE PARK, SUITE H-101
5555 North Lamar Austin, Texas 78751

July 3, 1978

Honorable John Hill
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attn: David Kendall

Dear Sir:

On May 15, 1978, the Texas Optometry Board forwarded a letter to your attention requesting that the Attorney General's Office enforce Section 5.11 of the Texas Optometry Act as it applies to the Texas State Optical Office at 7125 Southwest Freeway, Houston, Texas, with the means and timing of the enforcement left to your discretion.

At a recent Board meeting on June 28, 1978, the Board voted to send a second communique to you, incorporating the request that your office refrain from seeking to enforce that section of the Act until the Texas Optometry Board has had the opportunity to study the newly-promulgated Federal Trade Commission Rules and Regulations and their possible effect on the enforceability of that section of the Act.

Very truly yours,

s/s
E. Richard Friedman, O.D.
Chairman of the Board

ERF/le

cc: All Board Members

(seal)

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

THIS is to certify that I, Lois Ewald, am Executive Secretary of the Texas Optometry Board and in such capacity have the custody and control of the Board's records, and I hereby certify that the attached is a true and correct copy of a letter dated July 3, 1978, forwarded to John Hill, Attorney General of Texas.

s/s
Lois Ewald
Executive Secretary
Texas Optometry Board

DATE: August 15, 1978

(SEAL)